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No. 458

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

MARTIN J. WIMAN, Warden,
Kilby Prison, Montgomery, Alabama,
et al.,

PETITIONERS

VS.

JIMMY ARGO, ALIAS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Martin J. Wiman, Warden, Kilby Prison, Montgomery, Alabama et al., by and through the Attorney General of the State of Alabama, MacDonald Gallion, petition for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above captioned case on August 31, 1962, rehearing denied August 31, 1962.

OPINIONS BELOW

The opinons and orders of the United States District Court for the Middle Dstrict of Alabama are unreported to date, but are dated July 27, 1962 (two orders) and the order denying rehearing is dated July 31, 1962, and are printed in Appendix A hereto, *infra*, pp 17-30.

The opinion of the Court of Appeals for the Fifth Circuit is unreported to date, but is printed in Appendix B hereto, *infra*, pp. 31-38.

The separate concurring opinion of Circuit Judge Gewin of the Court of Appeals for the Fifth Circuit, is unreported to date, but is printed in Appendix C hereto, *infra*, pp. 39-41.

Reh. den. and stay granted Appendix D hereto, *infra*, pp. 42-44.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1962, and application for rehearing was denied on August 31, 1962; however, a petition for stay of mandate of the Circuit Court was granted on August 31, 1962.

The jurisdiction of this Court is invoked under Title 28, United States Code, 1254(1).

QUESTIONS PRESENTED

I

Whether, under the due process clause of the Fourteenth Amendment of the United States Constitution, the United States District Court for the Middle District of Alabama and the United States Court of Appeals for the Fifth Circuit, erred in failing to determine that the appellee, Jimmy Argo, had waived his right to raise the question of a continuance to obtain the services of his retained counsel, the Honorable Arthur Parker, at his original trial, by failure of the retained counsel, Hon. Arthur Parker, to raise this question upon his belated appearance at the original trial, or in the motion for new trial, filed by retained counsel, when the case was

affirmed on direct appeal from his conviction and the issue of a continuance was not presented at that time, such a determination by the courts below, being directly contrary to *Willis v. Hunter*, 166 Fed. 2d 721; *U.S. v. Nierstheimer*, 74 Fed. Supp. 992; and *U.S. v. Robinson*, 105 Fed. Supp. 153.

II

Did the United States District Court for the Middle District of Alabama and the United States Court of Appeals for the Fifth Circuit err in failing to determine that there had been a reasonable refusal to hear the petitioner through his retained counsel, the Honorable Arthur Parker, rather than an arbitrary refusal to hear the petitioner through his retained counsel, within the meaning of *Chandler v. Fretag*, 348 U.S. 3, 75 Sup. Ct. 1, 99 L. Ed. 4; and *Reynolds v. Cochran*, 365 U.S. 525, 81 Sup. Ct. 723, 5 L. Ed. 2d 754, when at the present time, *Betts v. Brady*, 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595, does not require the appointment of counsel in a non-capital case when the accused is, as here, intelligent, of a full grade school education, between thirty-five and forty years of age, in good health, and his defense consisted of a simple alibi, and further, under the facts of the case at bar, the following occurred: (1) there was a diligent and sincere effort to locate the retained counsel, the Honorable Arthur Parker; (2) there was a fifty minute recess granted for the purpose of locating the retained counsel, an effort on the court's part, and all parties part, to locate the missing Mr. Parker; (3) the appointment of experienced trial counsel; the Honorable C. E. (Bud) Huey, prior to the trial; (4) a further recess was ordered and the Grand Jury files turned over to the court appointed counsel, Mr. Huey; (5) there was no specific objection directed to Mr. Huey, in that the appellee knew Mr. Huey was an experienced attorney, but not familiar with the case, and therefore, time was given

for the purpose of Mr. Huey's becoming familiar with the case; (6) for that the entire testimony before the Grand Jury was gone over by the court appointed counsel, with the accused, prior to trial, and the court appointed counsel and accused announced ready for trial; (7) for that the trial court placed no time limit on the conference between the court appointed counsel and the accused; (8) for that the trial court had absolutely no knowledge as to the whereabouts of the missing retained counsel, or that he would appear; (9) for that the trial court, in good faith, accepted the excuse tendered by Mr. Parker, namely that he had become ill, upon presentation of a statement to this effect by his physician, at the noon recess, and, did not penalize the accused or his counsel therefor; (10) for that it is at least a reasonable inference, that the retained counsel had no intention of participating in this case, having informed the accused that he would not represent him, not having been paid in full for his services; (11) for that at the time the accused made his request for a continuance to locate Mr. Parker, the accused had knowledge that he had not paid his retained counsel, and that his retained counsel might not appear; (12) for that retained counsel appeared before the State rested its case, recalled such witnesses as he deemed necessary and cross-examined same; (13) for that retained counsel and the accused were satisfied that all matters which were the product of pre-trial investigation were placed in evidence before the jury trying the case; (14) for that there was no complaint by the accused to his retained counsel, concerning his belated appearance, but to the contrary thanked retained counsel for his services; (15) for that retained counsel made no motion for a mistrial, or a continuance, upon his appearance in the case; (16) for that retained counsel failed to raise the question of his belated appearance in the motion for new trial filed by retained counsel in this cause; (17) for that it is a reasonable inference that the accused acted in bad faith, in

requesting a continuance when he had knowledge that his retained counsel might not appear, due to the failure of the accused to pay his retained counsel in full; (18) for that it is a reasonable inference that retained counsel only appeared in the case after being contacted by court appointed counsel, a matter of which the trial court had no knowledge, and the trial court acted in good faith, based on such information as presented to the trial court; (19) for that the trial Judge expressly stated that he felt all defendants were entitled to be represented by counsel, and that this was his motive in appointing an experienced trial attorney to represent the accused; (20) for that the accused has never repudiated the actions of his retained counsel in making his belated appearance in the trial, but to the contrary, seeks now to capitalize thereon, having waived same; (21) for that the appellee has failed to show that he was prejudiced by the action of his retained counsel, in making a tardy appearance; (22) for that no witnesses had been subpoenaed by retained counsel, and none requested by defendant; (23) for that under the facts of the case at bar, this case wholly fails to come within the meaning of *Chandler v. Fretag*, supra, and *Reynolds v. Cochran*, supra, in that in those cases, there was a summary refusal by the trial Judge to permit ignorant Negroes to employ counsel, which is vastly different from the facts of the case at bar. See *Avery v. Alabama*, 308 U.S. 444, 60 Sup. Ct. 321, 84 L. Ed. 377.

III

Did the United States District Court for the Middle District of Alabama and the United States Court of Appeals for the Fifth Circuit, err in failing to determine that when there has been a showing made by a prisoner, petitioner, that a possible constitutional right has been violated, and no prejudice shown to him thereby, the respondent, warden, is not

precluded from assuming the burden of proof, and may make a showing of harmless error, as to the alleged denial of the constitutional right, within the meaning of *Chandler v. Fretag*, 348 U. S. 3, 75 Sup. Ct. 1, 99 L. Ed. 4; and *Reynolds v. Cochran*, 365 U. S. 525, 81 Sup. Ct. 723, 5 L. Ed. 2d 754, under the facts of the case at bar, as outlined above in question two.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Fourteen, United States Constitution.

STATEMENT

The petitioner, Jimmy Argo, alias, was arrested pursuant to a warrant of arrest, dated February 6, 1960, for grand larceny of an interstate shipment of cigarettes, and the truck in which they were being carried. The petitioner was duly indicted and arrested. The case was called for trial on March 16, 1960, and was continued until the following day at 9:00 A.M., March 17, 1960, at which time the case had been continued for the purpose of commencement of trial. Petitioner below, Jimmy Argo, and his retained counsel, Honorable Arthur Parker, had been present in open court on the afternoon of March 16, 1960, when the trial Judge, the Honorable Wallace Gibson, continued the case until the following morning, due to the lateness of the hour in the day, for trial. Judge Gibson specifically advised all parties to be present at nine o'clock the following morning, namely March 17, 1960.

The judgment entry, reflects that thereupon, a jury trial ensued, and that the defendant was found guilty, as charged in the indictment, and on March 18, 1960, was sentenced to a term of six years imprisonment in the penitentiary, which the petitioner at the present time is serving. The petitioner

appealed his conviction to the Court of Appeals of Alabama, where same was affirmed May 31, 1960, without opinion.

The petitioner then filed a petition for writ of habeas corpus in the Circuit Court of Montgomery County, Alabama, averring that he was coerced into trial, in the absence of his retained counsel. This proceeding was reviewed by the Court of Appeals of Alabama, and an opinion rendered on June 30, 1961, and reported at .....Ala. App.....; 133 So. 2d 201, cert. denied Alabama Supreme Court, ...Ala. .....; 133 So. 2d 203, and cert. denied by the Supreme Court of the United States, Argo v. Wiman, No. 579 Misc., October 1961 term, cert. denied January 22, 1962, without opinion.

While the habeas corpus proceedings were pending, the petitioner made application to the Court of Appeals of Alabama, for leave to file for writ of error coram nobis, and on October 17, 1961, in an opinion reported at .....Ala. App. .....; 137 So. 2d 755, the Court of Appeals denied the application, and extended this opinion on rehearing, and overruled same, ...Ala. App.....; 137 So. 2d 757. Application for certiorari to the Supreme Court of Alabama was filed late, and was denied, 137 So. 2d 757. Petitioner then made application for certiorari to the Supreme Court of the United States, and same was denied by this Honorable Court in a cause entitled Argo v. Alabama, No. 1043 Misc., October 1961 term, cert. denied April 23, 1962 without opinion.

The petitioner then filed a petition for writ of habeas corpus in the United States District Court at Montgomery, Alabama, the petitioner's allegation being that he was coerced into trial, in the absence of his retained counsel, and that such constituted a denial of due process, under the Fourteenth Amendment to the Constitution of the United States.

Depositions were ordered taken; and the same were filed with the United States District Court, being the depositions of Judge Wallace Gibson, the Honorable C. E. (Bud) Huey, Argo's court appointed counsel, and the Honorable Arthur Parker, being Argo's retained counsel, all at his original trial on March 17, 1960, in the Circuit Court of Jefferson County, Alabama.

Further evidence was heard by the United States District Court at a hearing held June 15, 1962, and both parties were instructed to file briefs within ten days from the date of that hearing.

On July 27, 1962, the United States District Court entered its order and judgment, determining that Jimmy Argo, the appellee, was denied due process of law on the morning of March 17, 1960, in that he was ordered to trial with court appointed counsel, in the absence of his retained counsel, and that the trial court should have continued the cause, and further, that Jimmy Argo was without fault. Petition for rehearing was duly presented to the United States District Court, and this was denied on July 31, 1962, with extended opinion.

The United States Court of Appeals for the Fifth Circuit, on August 31, 1962, affirmed the order of the United States District Court, without going into the findings and conclusions of the United States District Court, and following the presentation of a petition for rehearing, denied this, also on August 31, 1962.

The United States Court of Appeals did, however, stay the mandate of that Honorable Court, in order that this petition for writ of certiorari might be presented to this Honorable Court.

REASONS FOR GRANTING THE WRIT

1. For that the determination of the United States District Court and the affirmance of the Court of Appeals, of a determination that the petitioner had not waived his right to present the question of a continuance, by virtue of the failure to present this question at the original trial, or in the motion for new trial, is directly contrary to other opinions of United States District Courts and of United States Circuit Courts, and no cases were cited by either the District Court or the Court of Appeals, in support of their determinations on this question, and further, that the determination of waiver was the basis for refusing the petition for writ of error coram nobis by the Court of Appeals of Alabama, in its opinion, ... Ala. App. ....., 137 So. 2d 755, rehearing denied 137 So. 2d 757, cert. denied *Argo v. Alabama*, No. 1043 Misc., October 1961 term, cert. denied April 23, 1962.

2. For that the determination by the United States District Court and the affirmance thereof by the United States Circuit Court that the appellee, Jimmy Argo, was free from fault, is directly contrary to the facts of this case, in that at the time the appellee asked for a continuance in the original trial court, the appellee had knowledge that he had not paid his retained counsel in full, and had been advised by his retained counsel that, because of this, he would not represent him at his original trial, and the question of the payment of attorneys' fees, deals with the lifeblood of our honorable profession, and this question should be resolved by this Honorable Court.

3. For that the findings of arbitrariness by the United States District Court and the affirmance thereof by the United States Court of Appeals, under the facts of this case, are contrary to the decisions of this Honorable Court in

Chandler v. Fretag, 348 U.S. 3, 75 Sup. Ct. 1, 99 L. Ed. 4; and *Reynolds v. Cochran*, 365 U.S. 525, 81 Sup. Ct. 723, 5 L. Ed. 2d 754, in that in those cases, this Honorable Court was presented with a situation whereby ignorant Negroes were summarily denied an opportunity to employ counsel for their defense, and the facts of this case are vastly different, in that they show a reasonable, diligent effort to locate the missing retained counsel, and an honest effort to safeguard the rights of the accused by appointment of experienced trial counsel, and reasonable opportunity given appointed counsel to familiarize himself with the case, prior to trial. See *Avery v. Alabama*, 308 U.S. 444, 60 Sup. Ct. 321, 84 L. Ed. 377.

4. For that the question of whether or not the appellant, Martin J. Wiman, Warden, acting through the legal representatives of the State of Alabama, may assume the burden of proof to show harmless error, is a novel, unsettled and important question, that was carefully avoided by both the United States District Court and the United States Court of Appeals, and is of wide, vital interest to all fifty states in the Union, and calls for a determination by this Honorable Court of this issue, under *Chandler v. Fretag*, 348 U.S. 3, 75 Sup. Ct. 1, 99 L. Ed. 4; and *Reynolds v. Cochran*, 365 U. S. 525, 81 Sup. Ct. 723, 5 L. Ed. 2d 754.

The appellants contend that the opinion of the United States District Court and that of the United States Court of Appeals, affirming the District Court, in regard to the question of waiver by the appellee, are in direct conflict with other district and circuit court opinions, the testimony of the Honorable Arthur Parker, (R. p. 83) petitioner's retained counsel, on this question being as follows: (Dep. pp. 49-51)

"Q. And Mr. Argo never indicated to you, after you ap-

of necessity, be raised in all such cases where there is an alleged denial of right to counsel, and continuance to employ counsel; and it is respectfully submitted, calls for determination by this Honorable Court of this most important issue. The appellants further contend, and respectfully submit, that there has been here made, a showing of harmless error, under the facts of the case at bar, and that any other conclusion reached in this case, by the District Court and Court of Appeals, is wholly contrary to the following four cases: *Urban v. U. S.*, 46 Fed. 2d 291; *U. S. v. Rosenberg*, 157 Fed. Supp. 634, affirmed 257 Fed. 2d 760, affirmed 360 U. S. 367, 79 Sup. Ct. 1231, 3 L. Ed. 2d 1304; *Sherman v. U. S.*, 241 Fed. 2d 329, cert. denied 354 U. S. 911, 77 Sup. Ct. 1299, 1 L. Ed. 2d 1429, Reh. den. 355 U. S. 852, 78 Sup. Ct. 78, 2 L. Ed. 2d 61; *Baldwin v. U. S.*, 260 Fed. 2d 117, cert. denied 360 U. S. 938, 79 Sup. Ct. 1463, 3 L. Ed. 2d 1550.

It is further respectfully submitted to this Honorable Court, that the action of the United States Court of Appeals for the Fifth Circuit, in staying the original order of discharge of the District Court, and further, in staying the mandate of that Honorable Court by its own order, further shows to this Honorable Court, compelling reasons for granting the petition for certiorari in the instant case.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

MacDonald Gallion
Attorney General of the
State of Alabama

John C. Tyson, III
Assistant Attorney General
of Alabama

CERTIFICATE

This is to certify that I, John C. Tyson, III, one of the attorneys for appellants, and a member of the Bar of the Supreme Court of the United States, prior to filing, served two copies of the foregoing Petition for Writ of Certiorari of Appellants, on Jimmy Argo, appellee, % Mrs. Eleanor Layton, 1400 Robinwood Station, Birmingham, Alabama, by mailing them in a properly addressed envelope, with first-class postage prepaid, in the United States mail, on the ..... day of September, 1962.

John C. Tyson, III
Assistant Attorney General
State of Alabama

State Capitol
Montgomery 4, Alabama

APPENDIX "A"

In the

United States District Court For The Middle District Of Alabama, Northern Division

CIVIL ACTION NO. 1808-N

JIMMY ARGO,

Petitioner,

vs.

M. J. WIMAN, Warden,

Respondent.

ORDER

On April 30, 1962, Jimmy Argo, with leave of this Court, filed his petition for writ of habeas corpus in forma pauperis. Argo, who was tried and convicted in the Circuit Court of Jefferson County, Alabama, on March 17, 1960, is presently, and was at the time of the filing of his petition, in the custody of M. J. Wiman, the warden for Kilby Prison, State of Alabama, Montgomery, Alabama, and is serving a six-year sentence imposed upon him as a result of his conviction. Upon the filing of the petition, this Court ordered the warden to show cause why the writ should not be issued. On May 18, 1962, the Attorney General for the State of Alabama, representing the warden in this action, filed his response and answer to this Court's show cause order. Upon consideration of the petition and the response, this Court set the case for a hearing upon its merits. The matter was tried before the Court on June 15, 1962, and the case is now submitted upon

the pleadings, depositions, oral testimony, exhibits and briefs of the parties. The petitioner, Jimmy Argo, at his own request, represents himself.

Upon this submission, this Court finds that the petitioner Argo was arrested in February of 1960 for grand larceny of an interstate shipment and the truck in which the interstate goods were being carried. He was duly indicted in Jefferson County, Alabama, and his case was called for trial by the Circuit Court in that county on March 16, 1960. Sometime during the latter part of that day the case was continued until the following day at 9 a.m. Argo had retained an attorney by the name of Arthur Parker, Birmingham, Alabama, to represent him in this case, and Attorney Parker had been present in open court on the afternoon of March 16, 1960, when the trial judge, the Honorable Wallace Gibson, continued the case until 9 a.m. for the following morning. On the morning of March 17, 1960, the case was called for trial, and Argo's retained counsel, Arthur Parker, was not present in court. The trial judge recessed the case for fifty minutes, and during this interval a diligent effort was made to locate Attorney Parker. Following the short recess, the trial judge appointed the Honorable C. E. (Bud) Huey, a competent trial attorney of Birmingham, Alabama, to represent this defendant. Attorney Huey was appointed over the objection of Argo made to the trial judge in open court. The basis for Argo's objection was that he did not desire to go to trial in the absence of his retained attorney. He requested the trial judge to delay his trial until his retained attorney could be located and be present. This objection was overruled and the request refused. Upon the appointment of Attorney Huey, the trial judge directed the prosecuting officer to make his notes and the grand jury evidence relating to Argo's case available to Mr. Huey. The prosecutor's file was made available to Mr. Huey, and Huey and

Argo conferred approximately fifteen minutes prior to the commencement of the trial. During the course of this conference between Argo and his court-appointed attorney, Argo requested the court-appointed attorney to ask the trial judge for a continuance until his retained counsel could be located and be present. The court-appointed attorney refused to make this request, but promised the petitioner Argo that he would engage in certain delaying tactics during the selection of the jury and during the trial so that the retained counsel, Mr. Parker, could be located and be present for as much of the trial as possible; whereupon, the trial commenced, and prior to the noon recess approximately six witnesses, constituting practically all of the State's case, testified. The case was then recessed until 2:30 on that date. During the noon recess, the retained counsel was located, and the retained counsel, the court-appointed counsel, Argo, and some of the witnesses conferred before the trial resumed in the afternoon. Upon the resumption of the trial, other witnesses were called, and some of the State's witnesses who had testified that morning were recalled and cross-examined further by the defendant's counsel. During the afternoon session, the court-appointed counsel and the retained counsel were both present and both participated in defending Argo.

The evidence in this case further reflects that on the day previous to Argo's trial the retained counsel had also represented one of Argo's codefendants; that he was thoroughly familiar with the case and with the testimony that the witnesses (being essentially the same witnesses who testified in the codefendant's case) were to give on the trial of Argo's case. The case was submitted to the jury, and a verdict of guilty was returned. The following day, March 18, 1960, the defendant appeared before the trial judge, was adjudged guilty upon the jury verdict and sentenced to a term of six years' imprisonment in the Alabama penitentiary. Subse-

quent to this, counsel Arthur Parker filed a motion for a new trial, *no mention being made of the fact* that he was not present during the morning session of Argo's trial. The motion for a new trial was denied.

There is no question in this case but that Argo has exhausted the remedies available to him in the courts of the State of Alabama.*

Argo's contention is that his conviction on the two non-capital, grand larceny offenses violated the protection afforded him by the Fourteenth Amendment to the Constitution of the United States. On the evidence in this case, this Court concludes that the denial of Argo's motion for a short continuance or delay so that his retained counsel, Arthur Parker, could be located and be present, and the appointment of counsel who was not familiar with Argo's case, and the putting of Argo to trial with appointed counsel in the absence of his retained counsel, was arbitrary action on the part of the trial judge to an extent that Argo on March 17, 1960, in the Circuit Court of Jefferson County, Alabama, was denied his due process rights in a constitutional sense. The statement of the Supreme Court of the United States in *Reynolds v. Cochran*, (1961) 365 U. S. 525, is peculiarly applicable in this case:

* Argo appealed his conviction to the Court of Appeals of Alabama where it was affirmed on May 31, 1960, without opinion. In March, 1961, Argo filed a petition for writ of habeas corpus in the Circuit Court of Montgomery County, Alabama, which petition was denied. An appeal from this denial resulted in an affirmance dated June 30, 1961 and reported in .....Ala. App....., 133 So. 2d 201. An application for certiorari to the Supreme Court of Alabama was denied September, 1961, 272 Ala. 699, 133 So. 2d 203. An application for writ of certiorari to the Supreme Court of the United States was denied in January, 1962, without opinion. *Argo v. Wiman*, 369 U. S. 862.

". . . Under those facts, the statement of this Court in *Powell* v. *Alabama*, which provided the basis of our holding in *Chandler*, is wholly applicable: 'If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.'

" . . . Even assuming, which we do not, that the deprivation to an accused of the assistance of counsel when that counsel has been privately employed could ever be termed 'harmless error,'[12] it is clear that such deprivation was not harmless under the facts as presented in this case . . . ."

See also *Chandler* v. *Fretag*, (1954) 348 U. S. 3, where the Supreme Court stated:

". . . Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."

See also *House* v. *Mayo*, (1945) 324 U. S. 42, where the Court stated:

". . . This was a denial of petitioner's constitutional right to a fair trial, with the aid and assist-

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[12] It is significant that in *Chandler* we did not require any showing that the defendant there would have derived any particular benefit from the assistance of counsel."

ance of counsel whom he had retained. *Powell* v. *Alabama*, 287 U. S. 45; *Ex parte Hawk*, 321 U. S. 114, 115-116. We need not consider whether the state would have been required to appoint counsel for petitioner on the facts alleged in the petition. Compare *Betts* v. *Brady*, 316 U. S. 455, with *Williams* v. *Kaiser*, supra, and *Tomkins* v. *Missouri*, 323 U. S. 485. It is enough that petitioner had his own attorney and was not afforded a reasonable opportunity to consult with him. The fact that petitioner pleaded guilty after the denial of his request for time to consult with his counsel, does not deprive him of his constitutional right to counsel. *Williams* v. *Kaiser*, *supra*; *Tompkins* v. *Missouri*, *supra*."

The fact that Argo might not have been entitled, as a matter of right, to the appointment of counsel on these noncapital offenses, *Gilchrist* v. *State* (1937) 234 Ala. 73, does not affect his constitutional right to have a reasonable opportunity to locate his personally retained counsel who failed to show up, as directed, through *no fault of Argo*. *Cash* v. *Culver*, (1959) 358 U. S. 633, and *McNeal* v. *Culver*, (1961) 365 U. S. 109.

It is not necessary in this case for this Court to decide whether Argo is to be presumed prejudiced by the failure of his retained counsel to appear on time and by the forced representation of a court-appointed attorney in his noncapital cases, since, from an appraisal of the totality of facts and circumstances in this particular case, the failure and refusal on the part of the trial judge to delay the commencement of Argo's trial for a reasonable time was a denial of fundamental fairness within the meaning of *Crooker* v. *California*, 357 U. S. 433. This Court finds nothing in the case of *Betts* v. *Brady*, 316 U. S. 455, strongly relied upon by the Attorney General for the warden in this case, that is con-

trary to the conclusions herein reached by this Court. See *Reynolds v. Cochran, supra.*

This Court is well aware of the desire and necessity by a trial judge (particularly where he has jurors waiting and ready to serve) of operating his court in an expeditious manner, without undue delay. This Court is also acutely aware of the necessity on the part of the trial judge to refuse to countenance dilatory tactics which are, from time to time, engaged in by certain trial counsel. The evidence in this case reflects that the retained counsel, Arthur Parker, was not present because of some illness which required him to have the services of a physician on the morning of the trial. He failed to notify his client, the trial judge, or any of the court officials that he would be delayed until after the noon recess. The evidence further reflects that the trial judge had a conference in his chambers with Attorney Parker and out of the presence of the jury, concerning Parker's failure to notify the Court that he would not be present on the morning of Argo's trial. All this only serves to show that a reasonable delay in Argo's case from 9 o'clock in the morning until 2:30 in the afternoon would have eliminated the necessity of Argo's being put to trial on two charges of grand larceny with a counsel who was wholly and completely unfamiliar with the case and who had only a few minutes to prepare for the trial thereof. A trial judge's solution to such problems lies in the taking of action against the attorney who fails to appear or notify the court—and not in forcing a defendant into trial without his retained counsel and without a reasonable delay. This fundamental unfairness amounted to a denial of due process of law which was guaranteed to Argo by the Fourteenth Amendment to the Constitution of the United States. Argo's discharge from incarceration based upon the judgment of the Circuit Court of Jefferson County, Alabama, of March 18, 1960, wherein he was sen-

tenced to a term of six years' imprisonment in the penitentiary, is necessitated in this case.

In accordance with the foregoing and for good cause, it is the ORDER, JUDGMENT and DECREE of this Court that the verdict of guilt, the judgment of conviction, and the sentence pronounced thereon in the Circuit Court of Jefferson County, Alabama, on March 17 and 18, 1960, in the case of State of Alabama v. Jimmy Argo, be and each is hereby declared void and invalid as being in violation of Argo's constitutional rights.

It is the further ORDER, JUDGMENT and DECREE of this Court that Jimmy Argo be discharged from the custody of the State of Alabama and from the custody of Martin J. Wiman, as warden of Kilby Prison, Montgomery, Alabama, and from the custody of any other officers, employees, or agents of the State of Alabama, which custody is pursuant to the conviction and judgment of the Circuit Court of Jefferson County, Alabama, which was pronounced on March 18, 1960. It is ORDERED that Jimmy Argo's discharge from said custody be not later than 10 a.m., August 1, 1962.

It is ORDERED that the costs incurred herein be and they are hereby taxed against the respondent, for which execution may issue.

Done, this the 27th day of July, 1962.

Frank M. Johnson, Jr.
United States District Judge

APPENDIX "A"

In the

United States District Court For The Middle District Of Alabama, Northern Division

JIMMY ARGO,

Petitioner,

vs.

M. J. WIMAN, Warden,

Respondent.

CIVIL ACTION NO. 1808-N

ORDER

This cause is now submitted upon the motion of Jimmy Argo filed herein on June 19, 1962, wherein the said Jimmy Argo seeks to have this Court restrain and enjoin the officials for the State of Alabama from rearresting, and retrying him for either or both of the offenses for which he was adjudged guilty in the Circuit Court of Jefferson County, Alabama, on March 18, 1960. The issues raised by this motion are not properly before this Court in this habeas corpus proceeding. See the opinion of the United States Court of Appeals for the Fifth Circuit affirming this Court's refusal to issue such an order in the case of *Wiman* v. *William K. Powell* (July 13, 1961), 293 F. 2d 605.

It is, therefore, the ORDER, JUDGMENT and DECREE of this Court that the motion for a restraining order, filed herein on June 19, 1962, by Jimmy Argo, wherein he seeks

to have this Court restrain and enjoin the authorities for the State of Alabama from rearresting and reprosecuting him on the same charges for which he was arrested and prosecuted on March 17 and 18, 1960, be and the same is hereby denied.

Done, this the 27th day of June, 1962.

Frank M. Johnson, Jr.
United States District Judge

APPENDIX "A"

In the

United States District Court For The Middle District Of Alabama, Northern Division

JIMMY ARGO,

Petitioner,

vs.

M. J. WIMAN, Warden,

Respondent.

CIVIL ACTION NO. 1808-N

ORDER

This cause is now submitted upon the motion for a rehearing of the order and judgment of this Court in this cause filed herein on July 27, 1962, and motion for a stay of said order, wherein Jimmy Argo was ordered to be discharged, and motion seeking and asking this Court to amend its findings and judgment.

Those several grounds in the motion, seeking to have this Court amend and stay its order, which are based upon the theory that Argo waived his right to question the belated appearance of his retained counsel, Arthur Parker, by virtue of Parker's failure to assert the request for a continuance as a ground for the motion for a new trial, were thoroughly considered by this Court prior to its order of July 27, 1962. This Court is of the opinion that under the circumstances in this particular case and particularly in view of the testimony

of Attorney Huey, Attorney Parker and Judge Gibson, all given by deposition in this case), Argo could not reasonably expect his retained counsel, Arthur Parker, to raise his own failure to appear in court—whether it was caused from dereliction of duty as the State now hints in its motion, or whether it was caused from a genuine illness—as a ground for a new trial in Argo's behalf. The fact that Parker did not assert as a ground the fact that he failed to appear, *strongly indicates to this Court that Argo might not have been fairly and completely represented on his motion for a new trial, since* a more substantial reason for a new trial lay in the failure of the lawyer that was representing him on his motion for a new trial to appear timely and represent him, as he was obligated to do, on the trial of the case. This Court continues of the firm conclusion that in this particular case Argo did not waive the failure of his retained counsel to appear on the trial of his case by reason of the failure of his retained counsel to raise that fact in his motion for a new trial.

The next ground in the motion now before this Court which deserves comment is that ground wherein it is stated that Argo was not prejudiced by the failure of the trial court to grant him a continuance until his retained counsel appeared because no witnesses were subpoenaed by retained counsel to appear for the defense. This overlooks the fact that Argo's retained counsel also represented Argo's co-defendant who was tried the day before Argo's case was scheduled. The testimony presented to this Court shows that the same witnesses who testified in the codefendant's case—whether their testimony was favorable or unfavorable to the defense—had been subpoenaed by the State in the co-defendant's case and were directed to appear and be available to both parties for Argo's case. Retained counsel knew this; he had interviewed them; he had examined them in the code-

fendant's case and knew exactly what their testimony was to be. Appointed counsel did not know this.

The only other ground in the motion now before this Court which deserves comment is the ground predicated upon the theory that it was Argo's fault that retained counsel did not appear in that "retained counsel had advised petitioner, prior to trial, that he would not appear as his attorney until paid . . ." The evidence before this Court does not sustain such a contention. It is true that Argo had not fully paid his retained counsel. However, his retained counsel had not withdrawn as Argo's attorney and had not filed any motion with the trial court seeking leave to withdraw as Argo's attorney. To the contrary, the testimony in this case reflects that retained counsel, in Argo's presence in open court on the day preceding Argo's trial, advised the court that he would be present in open court at 9 a.m. on the next day to represent Argo in his case. If, as the State now infers in its motion, retained counsel failed to appear timely because Argo had not completely paid his attorney's fee, then the law does not permit such conduct on the part of officers of the court when said conduct prejudices the rights of a defendant in a criminal case. If, as the State infers, the failure of retained counsel to appear on the morning of March 17, 1960, was due to Argo's failure to pay him, then, under the circumstances in this case, where there is no motion to withdraw as counsel and where the trial court was led to believe late on the afternoon before the trial that counsel would be present at 9 a.m. the next day, the problem becomes a disciplinary matter between the trial court and the attorney, and not a matter of the trial court's requiring a defendant to go to trial with appointed counsel on short notice.

For the foregoing reasons and for good cause, it is the ORDER, JUDGMENT and DECREE of this Court that the

motion for a rehearing in this cause be and the same is hereby denied.

It is the further ORDER, JUDGMENT and DECREE of this Court that the motion seeking to have this Court amend its findings and judgment of July 27, 1962, be and the same is hereby denied.

It is the further ORDER, JUDGMENT and DECREE of this Court that the motion for a stay of the order of this Court requiring Argo to be discharged on or before 10 a.m., August 1, 1962, be and the same is hereby denied.

Done, this the 31st day of July, 1962.

Frank M. Johnson, Jr.

United States District Judge

been affirmed on appeal, leave must first be secured from the appellate court to petition the trial court for a writ of error coram nobis. When an appellate court does not actually assume and exercise its jurisdiction to review a judgment by appeal or otherwise, application to the appellate court for leave is not necessary or even permissible, and the petitioner has a right to seek relief in the State circuit court in which he was convicted. *Ex parte Williams*, Ala., 1951, 53 So. 2d 334; *Ex parte Smith*, Ala., 1956, 89 So.2d 694; *Ex parte Terry*, Ala.App., 1959, 116 So.2d 615; *Allison v. State*, Ala., 1962, 137 So.2d 761.

There is no constitutional inhibition to a state's providing for review of a judgment of conviction by coram nobis instead of habeas corpus. *Hysler v. Florida*, 1942, 315 U.S. 411, 416, 417; *Taylor v. Alabama*, 1948, 335 U.S. 252, 261. In an unreported opinion denying a certificate of probable cause for appeal (28 U.S.C.A. §2253), the writer had commented:

> "True it appears from the record that the acts of the petitioners forming the basis of their judgments of conviction for disorderly conduct under Section 311 of the General City Code of Birmingham of 1944 may have consisted of nothing more than their peaceable efforts to test the constitutionality of an ordinance of the City of Birmingham delegating to the Birmingham Transit Company the power to make rules requiring the seating of passengers according to race, which ordinance has now been held unconstitutional. *Bowman v. Birmingham Transit Co.*, 5 Cir., 1960, 280 F.2d 531. If that be true, then the acts of the petitioners which occasioned their arrests and convictions were acts protected by the Constitution, and the petitioners are

> now in custody in violation of the Constitution of the United States. See 28 U.S.C.A. § 2241. At this stage, however, . . . it appears that the petitioners still have available remedies under the laws of the State of Alabama as adequate as habeas corpus in the federal district court, to raise the question of whether for any reason the petitioners are now in custody in violation of the Constitution of the United States, and particularly the question of whether Section 311 of the General City Code of Birmingham of 1944 is unconstitutional on its face.

Phifer and Shuttlesworth v. Moore, decided February 12, 1962. The Supreme Court vacated that order and remanded the case to the district court "with instructions to hold the matter while petitioner pursues his state remedies (as indicated in the opinion of Judge Rives denying a certificate of probable cause), including an application for bail to state courts pending disposition of petitioner's application for state relief." *In the Matter of F. L. Shuttlesworth*, No. 1973, Misc., decided February 26, 1962. Thus the Supreme Court followed its usual course of relying primarily upon the local judge for the existence of state remedies. After further study, it appears that the writer may have made too broad a statement in saying that state habeas corpus and coram nobis furnish "remedies under the laws of the State of Alabama as adequate as habeas corpus in the federal district court."

In the federal courts the writ of habeas corpus extends

"Whether by petition for habeas corpus or by petition for writ of error coram nobis is not for me to say. See *Ex parte Lee*, Ala., 1946, 27 So. 2d 147; *Johnson v. Williams*, Warden, Ala., 1943, 13 So.2d 683."

to a prisoner whenever "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. §2241 (c) (2). Whether in any case a prisoner must prove to the satisfaction of the court that he is innocent as a part of his proof that he is in custody in violation of the Constitution seems to the writer an extremely doubtful proposition. Certainly, in many cases that is not required. For example, a prisoner may complain of the severity of his punishment. That the death penalty might not have been imposed if the prisoner's constitutional rights had been observed was included within the issues in *United State ex rel. Goldsby v. Harpole*, 5 Cir., 1959, 263 F.2d 71, and in *United States ex rel Seals v. Wiman*, 5 Cir., 1962, 304 F.2d 53. The actual guilt or innocence of the prisoner-petitioner is not usually, if ever, within the issues to be decided on a habeas corpus hearing before a federal court.

On the other hand, the Alabama Supreme Court has declared at least in two cases that the writ of error coram nobis is available to a prisoner only when "it is made clearly to appear that petitioner has a valid defense." *Ex parte Taylor*, Ala., 1947, 32 So.2d 659, 661; *Ex parte Fewell*, Ala., 1954, 73 So.2d 558, 561. The strict limitations thus imposed upon the availability of habeas corpus and coram nobis may raise serious questions in some cases as to whether those writs considered together constitute an adequate remedy in the state courts to be exhausted before resort is had to a federal court. 28 U.S.C.A. §2254. No such questions are presented upon this appeal.

In the present case, while the state habeas corpus proceedings noted by the district court were pending, Argo also made application for leave to file a petition for writ of error coram nobis, which application was denied by the Court of Appeals of Alabama in an opinion reported at 137 So.2d 755,

extended on rehearing at 137 So.2d 756, 757. The Supreme Court of Alabama denied certiorari, 137 So2d 757, and on April 23, 1962, the Supreme Court of the United States denied certiorari in a cause entitled *Argo v. Alabama*, No. 1943 Misc., October Term 1961. These coram nobis proceedings, to which the district court probably intended to refer, lead us to agree that Argo has exhausted the remedies available to him in the State courts.

As to the petitioner's appeal, the question of whether he can be rearrested and re-tried on the same charges is a matter to be decided by the State courts in the first instance, and cannot be decided in advance by the district court or by this court. *Wiman v. Powell*, 5 Cir., 1961, 293 F.2d 605, 608, n. 3.

In other respects, we need not add to the findings of fact and conclusions of law of the district court. The judgment is affirmed, and the time for Argo's discharge from custody pursuant to his judgment of conviction is fixed at not later than 10:00 A.M., *Tuesday, September* 4, 1962. If, prior to that time, the respondent indicates an intention to seek review in the Supreme Court of the United States, we will enter a further order of stay but will substantially reduce the amount of bail bond required for Argo's enlargement.

This judgment takes effect as of 9 A.M., Friday, August 31, 1962, counsel having been notified. The mandate will be considered as having been issued immediately.

AFFIRMED.

Entered this August 31, 1962, 9:00 A. M.

Richard T. Rives,
United States Circuit Judge.

APPENDIX "C"

NO.....

M. J. WIMAN, Warden, et al.,

Appellants,

versus

JIMMY ARGO, Alias,

Appellee.

GEWIN, Circuit Judge, Specifically Concurring:

Under the federal decisions relating to habeas corpus, applying the "clearly erroneous" rule applicable to findings of fact by the trial court, assuming that the district court intended to refer to coram nobis proceedings in the footnote mentioned and referred to on page 3 of the opinion by Judge Rives, and it appearing that Argo has exhausted the remedies available to him in the state courts, I concur in the results reached in the well-reasoned and logical opinion written by Judge Rives.

I fully agree with the Attorney General and with Judge Rives ". . . that an understanding of the remedies available in Alabama to test the validity of judgments of conviction of State prisoners is a matter of much importance . . .". I likewise agree with the statement in the opinion that "There is no constitutional inhibition to a state's providing for review of a judgment of conviction by coram nobis instead of habeas corpus.". In my view, the statement of Judge Rives in the unreported case of Phifer and Shuttlesworth v. Moore, decided February 12, 1962, and referred to by him on pages 4 and 5 of his opinion, is a correct statement of the law. He

underestimates the splendid conclusion there reached by now stating:

> "After further study, it appears that the writer may have made too broad a statement in saying that state habeas corpus and coram nobis furnish 'remedies under the laws of the State of Alabama as adequate as habeas corpus in the federal district court'."

Rather, I thoroughly approve of his former conclusion. As to Alabama procedure, it cannot be said, ". . . that there is either an absence of available State corrective processes or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner". 28 U.S.C.A. §2254.

Comity and a delicate balance of inter-jurisdictional relationships between federal and state courts are factors quite as important as the review of state convictions by a federal district judge whose findings of fact import verity when witnesses have testified. A review of such findings in this court is extremely limited. Federal courts must know that state courts are just as much concerned with the preservation of federal Constitutional rights as are the federal courts. Convictions of state prisoners which have been reviewed by the entire hierarchy of state courts from top to bottom, should not be subject to constant federal judicial review except in cases of extreme urgency or unusual circumstances.

We have no quarrel with the philosophy that makes sure that innocent men are not punished, that meritorious claims are not slighted, and that miscarriages of justice should be corrected at all costs. It is doubtful however, that federal

judges with federal procedure serve these principles any better than state judges with state procedure. The federal courts are filled with frivolous and repeated petitions seeking release from confinement on strange and unusual grounds. Often such petitions are based upon assertions of alleged facts, which have originated in the fertile minds of cunning criminals. There are numerous examples where federal courts, no doubt prompted by the highest motives, have released dangerous state prisoners who could not be re-tried for heinous crimes because of the lapse of time or the absence of witnesses. Of interest is an article entitled "Federal Habeas Corpus Review of State Court Convictions" by Honorable Charles S. Desmond, Chief Judge, New York Court of Appeals, 50 Georgetown Law Journal 755 (1962). Judge Desmond commences his article with the following quotation attributed to Justice Robert H. Jackson:

> ". . . call it res judicata or what one will, courts ought not to be obligated to allow a convict to litigate again and again exactly the same question on the same evidence. . . . The writ has no enemy so deadly as those who sanction the abuse of it, whatever their intent."

Nothing herein stated is intended to be critical of the opinion written by Judge Rives, whose opinions generally, as well as the one he has written in this case, demonstrate refined logic, a full grasp of the law and the facts, and unusual sincerity of purpose. He has rendered a service to the State of Alabama in reviewing the subject under consideration. Under modern jurisprudence, his judgment as to what will be required of the State of Alabama in the nature of State remedies or State corrective process, is far superior to mine.

APPENDIX "D"

In the

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

M. J. WIMAN, Warden, et al.,

Appellants,

versus

JIMMY ARGO, Alias,

Appellee.

Appeal from the United States District Court for the

Middle District of Alabama.

(1962)

ON PETITION FOR REHEARING

Before RIVES and GEWIN, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled cause is hereby

DENIED.

Enter this Aug. 31/62

Richard T. Rives

Circuit Judge

APPENDIX "D"

In the

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. .....

M. J. WIMAN, Warden, et al.,

Appellants,

versus

JIMMY ARGO, Alias,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

It is further ordered that the appellee prisoner, Jimmy

Argo, shall be enlarged upon recognizance or bail bond payable to the United States of America and the State of Alabama in the amount of $1500.00 with surety conditioned for his appearance[1] in the district court to answer and abide by the judgment of this court and by the judgment of the Supreme Court of the United States. Said bond shall be with good and sufficient surety to be approved by the Clerk of the United States District Court for the Middle District of Alabama.

The original of this order shall be filed in the office of the Clerk of the United States Court of Appeals for the Fifth Circuit and a copy in the office of the Clerk of the United States District Court for the Middle District of Alabama.

Entered this the 31st day of August 1962.

Richard T. Rives
United States Circuit Judge.

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[1] "Appear" or "appearance" as used in any such bond includes the meaning and requirement that the appellee prisoner personally appear in the district court even though the judgment of the district court may be affirmed. Only by that construction of "appear" and "appearance" can we avoid creating a hindrance or obstacle to the State of Alabama in its possible right to rearrest and reprosecute the appellee prisoner under the same indictment or for the same offense. See Wiman v. Powell, 5 Cir., 1961, 293 F.2d 605, 608, n. 2 and authorities there collected.

APPENDIX "E"

(AMENDMENT XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

(Apportionment of Representatives in Congress)

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

(Persons Disqualified from Holding Office)

No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

Section 4.

(What Public Debts Are Valid)

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

(Power to Enforce This Article)

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.